STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2014
v SIMON JOSEPH AGUILAR, Defendant-Appellant.	No. 308066 Kent Circuit Court LC No. 11-003416-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v OMAR ROSAS, Defendant-Appellant.	No. 308067 Kent Circuit Court LC No. 10-012915-FC

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

In Docket No. 308066, defendant Simon Joseph Aguilar appeals as of right his convictions for second-degree murder, MCL 750.317; assault with intent to commit murder, MCL 750.83; possession of a firearm during the commission of a felony, MCL 750.227b; and possession of a firearm by a felon, MCL 750.224f. In Docket No. 308067, defendant Omar Rosas appeals as of right his convictions for second-degree murder, MCL 750.317, and two counts of assault with intent to commit murder, MCL 750.83. We affirm.

This case arises out of the death of Elmer Luis Chavez (Luis), as well as injuries suffered by other individuals, following a party on November 27, 2010. Initially, Luis suffered a gunshot wound to the chest before suffering several blunt force trauma injuries that were consistent with being struck by an automobile. Dr. David Start, a forensic pathologist, concluded that both the gunshot wound and the blunt force trauma injuries were potentially fatal injuries. He also explained that both injuries, in and of themselves, were sufficient to cause Luis's death. Aguilar was convicted of second-degree murder for shooting Luis, and for assault with intent to commit

murder for shooting another partygoer. Rosas was convicted of second-degree murder for running over Luis with his automobile, and for two counts of assault with intent to commit murder for striking two other individuals with his automobile.

In Docket No. 308066, Aguilar first argues that he is entitled to a new trial because the trial court failed to instruct the jury on the concept of superseding or intervening causation. In particular, he argues that the trial court should have instructed the jury that it could have found that Rosas's conduct of striking Luis with his automobile was a superseding or intervening cause that relieved Aguilar of criminal responsibility for Luis's death. Aguilar waived this issue because not only did he fail to request an instruction on intervening or superseding causation, but his trial counsel also affirmatively stated that he had no objections to the instructions given by the trial court. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). Nevertheless, because Aguilar argues that his trial counsel was ineffective for failing to request the instruction, we review the issue within the framework of an ineffective assistance of counsel challenge. Because Aguilar did not move this Court to remand for a *Ginther*[1] hearing or a new trial, this issue is unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Thus, our review is limited to facts apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"Jury instructions must clearly present the case and the applicable law to the jury. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (internal citation omitted). "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

One of the elements the prosecution must prove in a homicide case is that the defendant's conduct caused the victim's death. See, e.g., *People v Hudson*, 241 Mich App 268, 284-285; 615 NW2d 784 (2000). Causation is an issue for the finder of fact. *People v McKenzie*, 206 Mich App 425, 431; 522 NW2d 661 (1994). "In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause." *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), modified on other grounds *People v Derror*, 475 Mich 316, 319; 715 NW2d 822 (2006), overruled in part on other grounds *People v Feezel*, 486 Mich 184, 217; 783 NW2d 67 (2010). A defendant's conduct is a factual cause of an injury if the injury would not have occurred but for the defendant's conduct. *Schaefer*, 473 Mich at 436. "For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a direct and natural result of the defendant's actions." *Id.* (quotation marks and citation omitted). In determining whether proximate cause exists, "it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken." *Id.* at 436-437. "The

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability." *Id.* at 437.

The defendant's actions must be a proximate cause of the victim's death to warrant a conviction in a homicide case. *People v Bowles*, 234 Mich App 345, 349-350; 594 NW2d 100 (1999). There may be more than one proximate cause of an injury, and the fact that another individual's conduct is also a proximate cause of the injury does not shield a defendant from liability whose conduct was a proximate cause of the injury. See, e.g., *People v Tims*, 449 Mich 83, 96-97; 534 NW2d 675 (1995). Where a victim's death would have occurred regardless of another individual's conduct, the other individual's conduct does not excuse the defendant from being a substantial or proximate cause of the victim's death. See *People v Bailey*, 451 Mich 657, 676; 549 NW2d 325 (1996), amended in part on other grounds 453 Mich 1204 (1996). As explained by our Supreme Court in *Bailey*:

> In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law. [*Id.*]

Further,

> [i]f a certain act was a substantial factor in bringing about the loss of human life, it is not prevented from being a proximate cause of this result by proof of the fact that it alone would not have resulted in death, nor by proof that another contributory cause would have been fatal even without the aid of this act. [*Id.*, quoting Perkins & Boyce, Criminal Law (3d ed) p 783.]

Additionally, "[w]here an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *Id.* at 677.

The trial court did not err by failing to instruct the jury on the concepts of intervening or superseding causation because the evidence produced at trial did not support such an instruction. See *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003) (the trial court is only required to give an instruction if it is supported by the evidence). The only evidence presented at trial with regard to the cause of Luis's death was Dr. Start's testimony that *both* the gunshot wound inflicted by Aguilar and the blunt force trauma injuries inflicted by Rosas were potentially fatal wounds. Because both wounds were potentially fatal, both wounds were proximate causes of Luis's death. See *Schaefer*, 473 Mich at 436; *Bailey*, 451 Mich at 677-678. We reject Aguilar's citation to *State v Scates*, 50 NC 420 (1858), because its contrary holding conflicts directly with precedential Michigan cases such as *Bailey*. Moreover, because the only evidence presented at trial supports that both wounds were proximate causes of Luis's death, Aguilar's claim that the injuries inflicted by Rosas's conduct were a superseding or intervening cause that severed Aguilar's criminal responsibility for Luis's homicide is void of evidentiary support. See *Bailey*, 451 Mich at 677. Accordingly, where there was no evidence to support an instruction that Rosas's conduct was a superseding or intervening cause of Luis's death that

would have relieved Aguilar from criminal responsibility, the trial court was not required to *sua sponte* give an instruction on intervening or superseding causation. See *McKinney*, 258 Mich App at 163. Further, Aguilar's trial counsel was not ineffective for failing to request an instruction on intervening or superseding causation because "[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Aguilar next argues on appeal that he was denied his right to confront Armando Reta, one of the prosecution's witnesses. Reta testified that he saw Aguilar shoot Luis during a fracas that broke out in the parking lot after the party had concluded. Reta also testified that he was with Aguilar after the shooting, and that Aguilar stated, "[t]hat he shot that kid." Reta further testified that a few weeks after the shooting, Aguilar located him and told him to "keep [his] mouth shut." Following Reta's testimony on direct examination, Aguilar's trial counsel briefly cross-examined Reta before trial adjourned for the day. Reta was scheduled to appear for cross-examination the next day, but he did not do so, and subsequently could not be located. Because efforts to locate Reta were unsuccessful and Reta could not be cross-examined, the trial court presented the parties with the option of requesting a mistrial, or drafting a comprehensive curative instruction for the jury to disregard Reta's testimony in its entirety. Aguilar's trial counsel informed the court that he preferred a curative instruction, and began drafting an appropriate instruction. On the thirteenth day of this 16-day jury trial, the trial court read to the jury the following instruction, which was drafted by Aguilar's trial counsel:

> Ladies and gentlemen of the jury, in all criminal trials, the defendants have a constitutional right to confrontation and cross-examination of a witness. As to Armando Reta, the defendants have been denied their constitutional right to confrontation and cross-examination as to the witness, Armando Reta. I am instructing you to disregard the testimony of Armando Reta in its entirety and not rely or use his testimony in your deliberations when deciding on a verdict as to each of the defendants, Simon Aguilar and Omar Rosas. Further, you are instructed not to speculate as to why Armando Reta's testimony is being stricken. And finally, although it's not in the instruction, I'm going to ask you to actually tear out from your notebooks, the pages that include any notes you made during Mr. Reta's testimony. We want to make sure that there's no possibility that you consider it, okay? Everybody understand?

Aguilar now argues that his inability to fully cross-examine Reta denied him his right of confrontation, and that his trial counsel was ineffective for agreeing to the instruction, rather than requesting a mistrial. Aguilar waived the Confrontation Clause issue by drafting the curative instruction because "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (quotation omitted). As explained by our Supreme Court in *People v Buie*, 491 Mich 294, 306, 312; 817 NW2d 33 (2012):

> Defense counsel cannot acquiesce to the court's handling of a matter at trial, only to later raise the issue as an error on appeal. A contrary result would run afoul of the well-established legal principle that a defendant must raise objections at a time

> when the trial court has an opportunity to correct the error . . . and cannot harbor error as an appellate parachute. [Quotation and citations omitted.]

Although certain constitutional rights can only be waived by a defendant's personal waiver, "[t]here is no doubt that the right of confrontation may be waived and that waiver may be accomplished by counsel." *Id.*, citing *Melendez-Diaz v Massachusetts*, 557 US 305, 314 n 3; 129 S Ct 2527; 174 L Ed 2d 314 (2009). Here, we find that Aguilar's trial counsel waived this issue by drafting the curative instruction. *Id.* We also find that trial counsel's decision to request a curative instruction rather than a mistrial was the product of sound trial strategy. Indeed, where, as here, mistrial would have come during the middle of the prosecution's case-in-chief, a mistrial could have provided the prosecution with an advantage on retrial by helping it identify and remedy the weaknesses in its case. See *People v Lett*, 466 Mich 206, 218; 644 NW2d 743 (2002) (recognizing that a mistrial can provide the prosecution a "tactical advantage"); *People v Hicks*, 447 Mich 819, 843 n 38; 528 NW2d 136 (1994) (GRIFFIN, J). "We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case." *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Because of this wide discretion, we defer to trial counsel's chosen strategy in the case at bar.

Further, with regard to Aguilar's ineffective assistance of counsel claim, even if Aguilar could establish that trial counsel's stipulation to the curative instruction was objectively unreasonable, Aguilar is not entitled to relief because he cannot demonstrate prejudice. Initially, Aguilar fails to present any evidence that he could have used to impeach Reta's testimony. He thus fails to satisfy his burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Additionally, Aguilar cannot establish prejudice because even absent Reta's testimony, the evidence against him was overwhelming. Five other witnesses testified that Aguilar fired shots and that he was the only shooter, and two witnesses testified that they saw Aguilar shoot Luis. There was strong circumstantial evidence of Aguilar's guilt. He fled the jurisdiction after the shooting and he destroyed his cellular telephone which one witness testified contained a voicemail recording of part of the shooting. See *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Aguilar cannot establish prejudice because, as noted above, the jury was instructed to ignore Reta's testimony in its entirety, and "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

In reaching our conclusion, we would be remiss if we did not address Aguilar's argument that because confession evidence is uniquely compelling, the curative instruction did not suffice to cure the prejudice caused by his inability to cross-examine Reta. Confession evidence is unique, and it can be the most damaging evidence against a defendant. See, e.g., *People v Pipes*, 475 Mich 267, 281; 715 NW2d 290 (2006). However, curative instructions are presumed to cure most errors, see, e.g., *Abraham*, 256 Mich App at 279, except where the damage done was irreparable, *People v Messenger*, 221 Mich App 171, 179 n 3; 561 NW2d 463 (1997). The presumption that curative instructions will suffice applies "unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001), quoting *Greer v Miller*, 483 US 756, 767 n 8; 107 S Ct 3102; 97 L Ed 2d 618 (1987) (citations omitted).

Aguilar's argument is flawed because he simply presumes that he is entitled to relief because of alleged inadequacies of the curative instruction. He ignores the strength of the prosecution's evidence. Further, Aguilar's position does not find support in our case law. See, e.g., *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991) (holding that a Confrontation Clause violation that could not be remedied by instructions could be harmless where evidence of the defendant's guilt was overwhelming). Furthermore, because of the strength of the prosecution's case against Aguilar, he cannot make the requisite showing of an overwhelming probability that the jury would be unable to follow the instruction, nor can he demonstrate a strong likelihood that the effect of the evidence would be devastating to him. See *Dennis*, 464 Mich at 581.

Finally, in his appeal, Aguilar challenges the scoring of several offense variables (OVs). We find that Aguilar waived his challenge to OV 6, MCL 777.36, because his trial counsel, when given the chance to object to the trial court's scoring of OV 6, declined to raise an objection. Trial counsel's approval of the trial court's scoring decision amounted to waiver of the issue. *People v Loper*, 299 Mich App 451, 472; 830 NW2d 836 (2013). And, although Aguilar raised this issue in a motion to remand filed with this Court, he did not revive the issue by doing so. *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009) ("[W]e do not conclude that defendant's filing of a motion for resentencing would 'revive' an issue that the defendant had, indeed, already expressly waived."). Moreover, we have reviewed the scoring of OV 6, and found Aguilar's challenge to be meritless.

Aguilar also challenges the scoring of OV 3, MCL 777.33, and OV 13, MCL 777.43. He preserved these challenges by raising them at sentencing. *Loper*, 299 Mich App at 456. When a sentencing challenge is preserved,

> the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnote omitted).]

As to Aguilar's challenge to the scoring of OV 3, the record reveals that the trial court scored 25 points because it found that Aguilar inflicted a life-threatening injury when he shot Luis. As established by our Supreme Court in *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005), a life-ending injury is properly scored as a life-threatening injury under MCL 777.33(1)(c). Although Aguilar disagrees with the rule established in *Houston*, we are bound by the decision. *People v Watson*, 245 Mich App 572, 597; 629 NW2d 411 (2001).

With regard to OV 13, the trial court scored ten points because it found that Aguilar engaged in a continuing pattern of felonious criminal activity that was directly related to membership in a gang. Such a score is no longer authorized under MCL 777.43. Indeed, 2008 PA 562, which became effective April 1, 2009, amended MCL 777.43 and the amended version of the statute no longer permits a trial court to score ten points solely upon finding that the defendant engaged in a pattern of felonious criminal activity related to membership in a gang. Here, Aguilar committed the sentencing offense on November 27, 2010. The trial court erred as

a matter of law when it scored OV 13 pursuant to a version of the guidelines that was no longer effective after April 1, 2009. See *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). This sentencing error however, does not entitle Aguilar to resentencing, because the erroneous scoring of ten points under OV 13 does not change Aguilar's recommended minimum sentence range under the legislative guidelines. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). However, MCL 769.34(2) mandates that defendant be sentenced "within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed." Further, defendant has the right to be sentenced based on information that is accurate. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948). For these reasons a remand for correction of the presentencing investigation report is necessary.

In Docket No. 308067, Rosas challenges the sufficiency of the evidence for his second-degree murder and assault with intent to commit murder convictions. The only argument he raises is whether he possessed the requisite intent for each offense. "We review de novo a challenge on appeal to the sufficiency of the evidence." *Ericksen*, 288 Mich App at 195. In resolving Rosas's claims, "[w]e examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196.

"Due process requires that, to sustain a conviction, the evidence must show guilt beyond a reasonable doubt." *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). To establish second-degree murder, the prosecution must prove: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice may be inferred from the defendant's actions, including his use of a weapon. *People v Roper*, 286 Mich App 77, 85-86; 777 NW2d 483 (2009). An automobile can be considered a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993). Further, "[b]ecause intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *Harverson*, 291 Mich App at 178.

There was sufficient evidence of Rosas's malicious intent with regard to the second-degree murder conviction. Several witnesses testified that Rosas was trying to hit the people he struck with his automobile. Moreover, witnesses testified that Rosas accelerated while he drove towards Luis and the other victims, and that Rosas should have been able to see Luis before he struck him. There was evidence that Rosas stopped after he struck one of his friends with his automobile to see if the individual was injured, and that he did not stop after striking Luis and the other victims. Further, there was evidence that Rosas attempted to cover up his involvement in the crime by attempting to wash the blood off his automobile. Additionally, he instructed the occupants of the automobile to tell police officers that he had not been at the party where Luis was murdered. Rosas' dishonesty and attempts to cover up his involvement in the offense demonstrated evidence of his consciousness of guilt. *Unger*, 278 Mich App at 226. In light of the foregoing, and because all reasonable inferences from the evidence produced at trial must be drawn in favor of the jury verdict, there was sufficient evidence for a rational jury to find that Rosas had the requisite malicious intent for his second-degree murder conviction. See *People v*

Kissner, 292 Mich App 526, 534; 808 NW2d 522 (2011) (holding that all reasonable inferences must be drawn in favor of the jury verdict); *DeLisle*, 202 Mich App at 672.

There was also sufficient evidence from which a rational jury could find that Rosas possessed the requisite intent for his assault with intent to commit murder convictions. "The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Ericksen*, 288 Mich App at 195-196 (quotation and citation omitted). As discussed *supra*, there was evidence that Rosas intentionally struck the victims with his automobile. Indeed, one witness testified that Rosas attempted to hit one of the victims a second time after the victim managed to run away. And, as discussed *supra*, there was evidence that Rosas attempted to conceal his involvement in the offenses after-the-fact. Consequently, there was ample circumstantial evidence from which a rational jury could infer that Rosas acted with the intent to kill, and that the killing, if successful, would have been murder. See *id.*; *DeLisle*, 202 Mich App at 672. Therefore, the prosecution presented sufficient evidence for a rational jury to find Rosas guilty of two counts of assault with intent to commit murder.

In Docket No. 308066, we affirm defendant Aguilar's convictions and sentences. In Docket No. 308067, we affirm defendant Rosas' convictions. We remand for the correction of defendant Aguilar's presentence investigation report. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens